



Department of
**Environment &
Conservation**

Startup, Shutdown, and Malfunctions – EPA's (Challenged) 2015 SIP Call

Environmental Show of the South

April 20, 2016

Overview of Presentation

- Explanation of state implementation plan (“SIP”) calls
- Summary of EPA’s 2015 SIP call related to startup, shutdown, and malfunction (“SSM”) provisions
- Update on litigation challenging EPA’s 2015 SIP call

What is a SIP Call?

- Under the Clean Air Act, states have the “primary responsibility for assuring air quality” and develop SIPs to ensure compliance with the National Ambient Air Quality Standards (“NAAQS”). 42 U.S.C. § 7407(a). SIPs contain enforceable emission limitations. § 7410(a)(2)(A).
- EPA will disapprove (or “call”) a SIP if it “finds” that the plan is “substantially inadequate to attain or maintain the relevant [NAAQS].” § 7410(k)(5). In this case, EPA will require the state to revise the plan to correct the inadequacies. *Id.*

EPA's 2015 SIP Call – SSM Provisions

- 80 Fed. Reg. 33,840 (June 12, 2015).
- In response to a petition for rulemaking filed by Sierra Club, EPA called the SIPs of 36 states and the District of Columbia due to “substantial inadequa[cies]” related to the treatment of excess emissions during SSM periods. *Id.*
- In this final action, EPA also clarified, restated, and revisited its existing policy for these excess SSM emissions. The final rule “embodies the EPA’s updated SSM Policy as it applies to SIP provisions.” *Id.*

EPA's 2015 SIP Call – SSM Provisions (cont'd)

- EPA found substantial inadequacies in SIPs that provided affirmative defenses for excess emissions during SSM periods. *Id.* at 33,851.
 - E.g., “Violation of standards set forth in this section, as a result of unavoidable malfunction, despite the conscientious employment of control practices, shall constitute an affirmative defense on which the discharger shall bear the burden of proof.” D.C. Mun. Regs. 20-606.5

EPA's 2015 SIP Call – SSM Provisions (cont'd)

- EPA concluded that all affirmative defense provisions were inappropriate:
 - “[T]he enforcement structure of the [Clean Air Act], embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court’s jurisdiction or discretion to determine the appropriate remedy in an enforcement action.” 80 Fed. Reg. 33,851.

EPA's 2015 SIP Call – SSM Provisions (cont'd)

- EPA also concluded that “director’s discretion” SIP provisions for excess emissions during SSM periods had the same practical effect as “automatic exemptions” and were prohibited. *Id.* at 33,874-75.
 - E.g., “The Director may, in the Air Permit, exempt on a case by case basis any exceedances of emission limits which cannot reasonably be avoided, such as during periods of start-up, shut-down or load change.” Ala. Admin. Code 335-3-14-.03(1)(h)(1).
- In the final rule, EPA “reiterat[ed] . . . that SIP provisions cannot contain unbounded director’s discretion provisions, including those that operate to allow for variances or outright exemptions from SIP emission limitations for excess emissions during SSM events.” 80 Fed. Reg. 33,917.

Legal Challenges to the 2015 SIP Call

- Southeastern Legal Foundation, Inc. filed a petition for review in the D.C. Circuit Court of Appeals on June 12, 2015.
- State petitions for review were consolidated on August 21, 2015.
- Tennessee’s docketing statement, filed September 11, 2015, argues that “EPA has not provided support for its assertion that the Tennessee rule in question is substantially inadequate to attain or maintain the relevant [NAAQS].”
- Industry and state petitioners filed opening briefs on March 16, 2016.
- EPA’s response brief is due July 14, 2016, and petitioners’ reply briefs are due September 14, 2016.

Legal Challenges to the 2015 SIP Call (cont'd)

- Issues raised by the states (State Pet'r Br. 1-2):
 - Whether EPA may “find” that SIPs are “substantially inadequate” without making any factual findings to support that determination
 - Whether EPA properly called SIPs that contained “automatic exemptions,” “director’s discretion provisions,” and “affirmative defenses” for emissions during SSM periods
 - Whether EPA may call SIPs “for reasons that it did not find constitute substantial inadequacies”

Legal Challenges to the 2015 SIP Call (cont'd)

- State petitioners' arguments (State Pet'r Br. 9-12):
 - EPA made no findings to support its conclusion that the called SIPs are substantially inadequate.
 - Rather, EPA “read[s] the requirement to find a substantial inadequacy out of the Act” and “determine[s] that the standard is satisfied whenever EPA interprets any SIP provision as not complying with a legal requirement, regardless of the effects or magnitude of inadequacy.”
 - “EPA erred by asserting that the Act does not permit affirmative defenses, either to violations or just to monetary penalties.”
 - “[I]t is unclear whether EPA also purports to call SIPs based on factors beyond those that it has determined to constitute substantial inadequacies.”